SUPREME COURT, U. S.

JUL 1 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1958

MOHASCO INDUSTRIES, INC., *et al.*,
Petitioners

v.

ACME FAST FREIGHT, INC., *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RICHARD J. HARDY
425 Thirteenth Street, N.W.
Washington, D. C. 20004

RICHARD W. DORTCH
First National Bank Bldg.
Jackson, Mississippi 39205

MICHAEL P. REGAN
Mohasco Industries, Inc.
57 Lyon Street
Amsterdam, New York 12010

RICHARD H. LANGE
Mohasco Industries, Inc.
57 Lyon Street
Amsterdam, New York 12010

Counsel for Petitioners

Of Counsel:
HARDY & CHAPMAN

July 1, 1974

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

INDEX

	Page
Citation to opinions below	1
Jurisdiction	2
The questions presented	2
Statutory provisions involved	2
Statement	3
Reasons for granting the writ	6
Conclusion	13

CITATIONS

Cases:

Admiral Merchants Motor Freight, Inc. v. *United States*, 321 Fed. Supp. 353	4, 10
Anderson v. *Francis DuPont and Company*, 291 Fed. Supp. 705	5
Arizona Grocery Co. v. *Atchison, T.&S.F.R. Co.*, 284 U.S. 370	4
Arkadelphia Milling Company v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134	4
Atlantic Coast Line R.R. Co. v. *Florida*, 295 U.S. 301	4
Baltimore & O.R. v. *United States*, 279 U.S. 781	4
Bell Potato Chip Co. v. *Aberdeen Truckline*, 43 M.C.C. 337	7
Crown Coat Front Co. v. *United States*, 386 U.S. 503	12
F.C. Stiles Contracting Co. v. *Home Insurance Co.*, 431 Fed 2d 917	5
Hewitt-Robins v. *Eastern Freight-Ways*, 371 U.S. 84	7, 8
McFadden Express, Inc. v. *Adley Corp.*, 363 Fed 2d 546	7

INDEX—Continued

	Page
Middlewest Motor Freight Bureau v. *United States*, 433 Fed 2d 212	4, 9, 10
Texas & P.R. Co. v. *Abilene Cotton Oil Co.*, 204 U.S. 426	4
T.I.M.E., Inc. v. *United States*, 359 U.S. 464	2, 4, 5, 6, 8
United States v. *Associated Transport, Inc.*, 347 Fed. Supp. 650	5, 11, 12

Statutes:

28 U.S.C. § 1254	2
28 U.S.C. § 1332	5
28 U.S.C. § 2337	5
49 U.S.C. § 301	2

Miscellaneous:

Classification Ratings on Furniture, 337 ICC 709	3
H. Rep. No. 253 on H. R. 5401, U.S. Code cong. and adm. news 1965	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. ———

MOHASCO INDUSTRIES, INC., *et al.*,
Petitioners

v.

ACME FAST FREIGHT, INC., *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Fifth Circuit entered in the above case on April 1, 1974.

CITATION TO OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Mississippi, Jackson Division, sustaining respondent's motion to dismiss petitioners' action for restitution is printed in Appendix A hereto but is not recorded in the official reports. The opinion of the Court of Appeals, which affirmed dismissal of the complaint, is printed in Appendix B hereto and is reported at 491 Fed.2nd 1082.

JURISDICTION

The judgement of the Court of Appeals printed in Appendix B hereto was made and entered on April 1, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

THE QUESTIONS PRESENTED

The questions presented by this petition are:

(1) Does the decision of this Court in *T.I.M.E., Inc.* v. *U. S.*, 359 U.S. 464 (1959) bar a remedy in restitution to interstate shippers of freight by motor vehicle for excessive and unlawful charges, where the omission of post-shipment relief from the Motor Carrier Act[1] (and inclusion of such relief in other parts of the Interstate Commerce Act) had led this Court to conclude that Congress meant to deny motor carrier shippers continued access to pre-existing common law rights to retrospective relief, and that omission has since been rectified?

(2) Is the right to "reparation" conferred by the 1965 amendment to the Motor Carrier Act a "sole and exclusive" remedy despite the savings clause in Section 216(j) preserving consistent remedies and the existence of a compatible judicial remedy better suited to the needs and circumstances of injured shippers?

STATUTORY PROVISIONS INVOLVED

The pertinent sections of the Motor Carrier Act (49 U.S.C. 301 *et seq.*) are set forth in Appendix C hereto.

---

[1] The Interstate Commerce Act is set forth in Title 49 USC, §§ 1 *et seq.* Part II of the Act, sometimes called the Motor Carrier Act, is numbered §§ 201 *et seq.* in its text, but is designated §§ 301 *et seq.* in Title 49 USC. We shall herein refer to sections of the Act according to numeration in the *text* of the Act.

STATEMENT

Petitioners are related corporations (Mohasco Industries, Inc., and three of its subsidiaries) engaged in the manufacture and distribution of furniture. Respondents are motor common carriers engaged in the transportation of various goods, including furniture, from and to various points and places including petitioners' shipping and receiving points.

In January, 1968, respondent motor carriers filed tariffs with the Interstate Commerce Commission (ICC) increasing the charges applicable to furniture by 18% to 200% (average about 50%). Various furniture shippers, including petitioners, filed protests and the ICC, in response to those protests, instituted an investigation to determine whether the proposed increases resulted in "charges . . . that are unjust and unreasonable". Three years later, after respondents had lost every interim decision and exhausted every available administrative appeal, the ICC issued its final report in *Classification Ratings on Furniture* 337 ICC 709 (1970),[2] confirming the prior condemnations of the increased charges by a hearing examiner, a review board, and a division of the ICC, and ordering respondent motor carriers "to cancel the tariff schedules . . . on or before December 18, 1970" (see Appendix D, page 35a).

During the three years it took to resolve the ICC investigation, petitioners had paid respondent motor carriers the charges accruing under the legally applicable tariffs ultimately found unlawful by the ICC. Such charges exceeded, by more than $172,000, those due under the pre-existing lawful tariffs reinstated, by ICC order, on December 18, 1970. While an action at law for "reparations" could have been instituted under Section 204a of

[2] The ICC report and order is printed in Appendix D hereto.

the Motor Carrier Act as amended in 1965, that remedy was then outlawed for about one-third of the unlawful collections by reason of its two year limitation (§ 204a (2)). Moreover, the ICC in a June, 1970, order,[3] had directed its staff to advise shippers that "the true basis of the shippers' right to a refund [of excess motor carrier collections under tariffs ultimately condemned by the ICC] is their common law remedy for restitution". A U. S. Court of Appeals had seemingly confirmed this advice by sustaining a restitution action in comparable circumstances where, as here, the excessive charges which could have been the subject of an action under Section 204a had already been condemned by the ICC after going "through the proper agency channels" *Middlewest Motor Freight Bureau* v. *United States*, 433 Fed.2d 212, 235-6 (1970). Accordingly, petitioners elected to pursue the restitution remedy available under common law[4] and preserved by Section 216(j) of the Motor Carrier Act, which provides:

> Nothing in this section shall be held to extinguish any remedy or right not inconsistent herewith.

Petitioners made written demands upon motor carrier respondents for repayment of the unlawful portion of interim collections within a year of the ICC's order which had found them to be excessive. Upon refusal of those

---

[3] The order was issued in connection with another case where interim collections had been made under tariffs subsequently declared unlawful in the ICC decision reviewed in *Admiral Merchants Motor Freight, Inc.* v. *U.S.* 321 Fed. Supp. 353. The order is quoted in its entirety at pp. 25-26 of Respondents' August 13, 1973, brief to the court below.

[4] *Texas & P.R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 436 (1907), *Arizona Grocery Co.* v. *Atchison, T. & S.F.R. Co.*, 284 U.S. 370, 383 (1931), *Arkadelphia Milling Company* v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134, 135 (1919), *Baltimore & O.R.* v. *United States*, 279 U.S. 781, 786 (1928), and *Atlantic Coast Line R.R. Co.* v. *Florida*, 295 U.S. 301, 309 (1935). See also dissenting opinion of Justice Black in *T.I.M.E.*, 359 U.S. at p. 480.

demands, petitioners filed a complaint in the United States District Court of the Southern District of Mississippi, Jackson Division, on May 12, 1972, seeking restitution of the excessive charges retained by respondent motor carriers.

Jurisdiction of the U. S. District Court was based on the amount in controversy[5] and on diversity of citizenship (28 U.S.C. 1332(a)) and, alternatively, on the existence of a Federal question arising under an Act of Congress regulating commerce (28 U.S.C. 2337).

The motor carrier respondents moved for dismissal, claiming that the *T.I.M.E.* decision barred any post-shipment relief to interstate shippers by motor vehicle, citing a decision of another United States District Court which had sustained the same motion by the same counsel on the same grounds in an action arising out of the same ICC order. *U. S.* v. *Associated Transport, Inc.*, 347 Fed.Supp. 650 (D.D.C. 1972). The motion was granted in the district court's decision which did little more than recite agreement with the conclusion and reasoning in *Associated.* Both rulings were appealed, this case to Fifth Circuit, and the *Associated* case to the Circuit Court of Appeals for the District of Columbia. The latter appeal is still pending. The Fifth Circuit, in this case, affirmed the dismissal on two primary grounds, i.e.:

> (1) ". . . from and after the decision in *T.I.M.E.*, unless Congress by statute should direct to the contrary, the shipper had no remedy in the courts on

[5] The claims against 4 (of the 16) defendants exceed $10,000 for each such defendant and aggregate $143,216.55, out of a total $172,258.94. Claims against the remaining 12 fall below the $10,000 figure by varying amounts, and aggregate $29,042.39. All 16 defendants were joined in this action pursuant to Rule 20 of the Federal Rules of Civil Procedure as interpreted in *Anderson* v. *Francis DuPont and Company*, 291 F Supp 705 (DC, Minn. 1968) and in *F.C. Stiles Contracting Company* v. *Home Insurance Company*, 431 Fed 2d 917, 919-20 (CA 6, 1971).

common law principles by which he could sue, after the fact, for the restitution of charges . . ." and

(2) ". . . [subsequent] enactments would provide the sole and exclusive remedy for excessive charges . . . [and the 1965 amendment to Section 204a] did not alter or expand the "savings clause", 49 U.S.C. Section 316 (j)". (Appendix B, pp. 14a-15a)

In so ruling, the court below noted decisions in other circuits which "indicate the existence of an organized move to have *T.I.M.E.* reversed", but said the "trouble" with arguments based on those decisions is that none "were decisions of the Supreme Court of the United States". The court concluded:

> If that is to happen [i.e., if *T.I.M.E.* is to be reversed] it will have to be done by the Supreme Court, not by any of the inferior courts (Appendix B, page 16a).

REASONS FOR GRANTING THE WRIT

(1) The decision below accepts, as a dispositive and binding precedent, a fifteen year old decision of this Court, which it acknowledges has been eroded by subsequent decisions of other circuits indicating, in the court's phrase, "the existence of an organized move to have *T.I.M.E.* reversed". The decision below fails to acknowledge that *T.I.M.E.*'s erosion is accounted for not so much by a change in judicial attitude as by a change in the legislative framework bearing directly upon the Congressional policy towards retrospective relief to interstate shippers by motor carrier. Justice Harlan, speaking for the majority in *T.I.M.E.*, had said:

> The question is, of course, one of statutory intent. We do not think that Congress . . . intended by the savings clause of Section 216 (j) to sanction a procedure such as that here proposed. It would be anomalous to hold that Congress intended that the sole effect of the omission of reparation provisions

> in the Motor Carrier Act would be to require the shipper in effect to bring two law suits instead of one . . . (359 U.S. at page 474)

By its subsequent action, Congress plainly indicated that the majority report in *T.I.M.E.* had misconceived its intent. The 1965 amendment to Section 204a was designed expressly "to sanction a procedure" which *T.I.M.E.* did not think Congress intended. It "restored a procedure formerly available to shippers which was set aside by the Supreme Court in 1959 by its decision in the *T.I.M.E.* case . . ." (H. Rep. No. 253 on H. R. 5401, U. S. Code cong. and adm. news 1965, p. 2931) Judge Friendly paraphrased the legislative intent of the 1965 amendment in *McFadden Express, Inc.* v. *Adley Corp.*, 363 Fed.2nd 546 (CA2 1966):

> The Commission and the committee reports justified the reparations amendment [to Section 204a] as correcting what was thought to be an erroneous decision in the T.I.M.E. case . . . (363 Fed.2nd at 549)

Congress thus restored shippers to the position they had occupied prior to this Court's decision in *T.I.M.E.*—a position which the court below described thus:

> Until 1959 many considered that this common law right of recovery had survived the enactment of Part II of the Interstate Commerce Act by reason of its "savings clause", 49 U.S.C. § 316(j); Barrows Porcelain and Enamel Company v. Cushman Motor Delivery Company, 1939 11 M.C.C. 365; Bell Potato Chip Company v. Aberdeen Truckline, 1944, 43 M.C.C. 337.

The court below acknowledges that *T.I.M.E.* was a 5-4 decision and that this Court reached a seemingly contrary result three years later in *Hewitt-Robins* v. *Eastern Freight-Ways*, 371 U.S. 84 (1962) where, significantly, it favorably cited (at p. 89) the *Bell Potato Chip* case which the court below says "fell prey to a total re-

versal" in *T.I.M.E.* (Appendix B, page 13a). The court below emphasizes that the majority in *Hewitt-Robins* was at "great pains" to assert that it was distinguishing, not reversing, *T.I.M.E.* (See, nonetheless, Justice Harlan's dissent insisting that the *Hewitt-Robins* majority decision did reverse the decision he wrote in *T.I.M.E.* and that, in his words, the *T.I.M.E.* decision "plainly controls this one." 371 U.S. at page 89) But the court below ignores the fact that the Motor Carrier Act, as constituted when both *T.I.M.E.* and *Hewitt-Robins* were decided, differed from its present form in a manner directly related to the legislative intent sought to be implemented (somewhat diversely) in those decisions.

Justice Harlan's 1959 inquiry in *T.I.M.E.* was directed to whether the Section 216 (j) "savings clause" could provide indirect retrospective relief where the Motor Carrier Act, as then uniquely constituted, omitted any *direct* retrospective relief to shippers by motor vehicle. The savings clause preserved only remedies consistent with the structure of the Motor Carrier Act, and Justice Harlan found restitution inconsistent with what he regarded as a deliberate Congressional omission of any specific retrospective relief against motor carriers. Since the 1965 amendment to the Act, the appropriate inquiry has to be: Can the savings clause be regarded as preserving a *different* and (in present circumstances) a more fitting retrospective remedy than Congress has now directly incorporated into the Act? Obviously, the *T.I.M.E.* Court could not have answered this question, since the directly incorporated retrospective relief was not then a part of the Act. The court below had the question pending before it, but answered it incorrectly. Its conclusion, that the statutory remedy in reparation is a "sole and exclusive" remedy, is set forth *ipse dixit*, i.e., without supportive reasoning other than the statement that it "necessarily follows" from the *T.I.M.E.* decision. The Eighth Circuit,

in *Middlewest*, reached the opposite conclusion in circumstances not materially different insofar as concerns the exclusiveness of the remedy, and provided a detailed and cogent rationale for its decision, which rationale is not logically tied to its peculiar facts and can not, therefore, be limited to them.

(2) The decision below concludes that the 1965 "reparations" amendment to the Motor Carrier Act provides "the sole and exclusive remedy for excessive charges". It dismisses as factually "inapposite", the decision of the Eighth Circuit in *Middlewest Motor Freight Bureau* v. *United States*, 433 Fed.2nd 212 (1971), cert. denied 402 U.S. 999 (1971), where the opposite conclusion had been reached with respect to the same 1965 amendment:

> We conclude that the principles of *T.I.M.E.* do not preclude restitution in this case, nor is Section 204a an exclusive remedy (433 Fed.2nd at p. 236).

These are plainly contradictory readings of the same statutory language, and the contradiction is not belied or explained by noting the different relief sought by aggrieved shippers in *Middlewest* and in the present case. *Middlewest* did not, of course, present or decide the same question presented here, i.e., whether shippers are entitled to retrospective relief for interim collections under unjustified motor carrier tariffs legally applicable to freight moved in the period *prior* to the ICC's final order. Nonetheless, the *Middlewest* rationale is, in large degree, extraneous to the time frame of the shipper's request for restitution of unlawful charges. Its conclusion that the restitution remedy survives under the 216(j) "savings" clause despite (or, in a sense, because of[6]) a di-

---

[6] *T.I.M.E.* found a Congressional policy against *any* retrospective relief in the omission of a specific "reparation" remedy coupled with the provision of such a remedy in the parts of the Interstate Commerce Act dealing with other carrier modes. The subsequent extension of such a specific reparations remedy into the Motor Carrier Act destroyed this "negative pregnant".

rectly provided statutory remedy in "reparations" is logically unconnected to that time frame.

The fact is that the *Middlewest* court simply and expressly refrained from deciding whether the shippers before it had the right to claim for excessive charges paid in the period prior to a final order by the ICC, because that claim was not presented to it and was "not before us in this case" (433 Fed.2nd at p. 222). The fact that its decision was, accordingly, limited to the issues before it plainly does not negate its precedent value so far as concerns its reasoning and conclusions on other issues presented there and here—most particularly the exclusive remedy issue. It was, for example, cited and relied upon in *Admiral Merchants Motor Freight, Inc.* v. *U.S.*, 321 Fed. Supp. 353 (D. Colo. 1971) aff'd *sub nom* 404 U.S. 302 (1971), where the shippers' claim did relate to excessive charges collected prior to the ICC's final order of condemnation. In sustaining the shippers' claim in the peculiar circumstances before it, which were acknowledged to be different than those in *Middlewest*, the court in *Admiral Merchants* said:

> Although the Court of Appeals, requiring restitution in that case, viewed the power of the court to order restitution as concomitant with the traditional equity powers of the court to issue injunctions, it also held a rate that is not shown to be just and unreasonable to be unlawful, at least from the time the Commission orders it cancelled (321 Fed. Supp. at p. 360).

To observe that *Middlewest's* facts are not entirely apposite does not require the observer to disregard or reject that portion of its rationale which fits the present circumstances. Thus, unless or until this Court relieves the apparent discrepancy in the conclusions expressed in these two appellate decisions, shippers and carriers and the federal agency which administers the Act regulating

their business interrelationships will be left to choose between their conflicting implications as best they can.

(3) The issue raised in this case and incorrectly resolved in the court below vitally concerns the rights of interstate motor carrier shippers, who, on an increasing basis in recent years, have been required to pay proposed increases running to millions of dollars for freight carried during all or most of the period in which the lawfulness of those proposals is being determined by the ICC. Where, as in the present case, the decisional process consumes more time than the period of limitations provided in the 1965 "reparation" amendment, the shipper is left without any relief at all under the lower court's determination that the reparations remedy is "sole and exclusive".[7] The ICC, which has (under § 216(g)) the specific discretion to suspend rate changes (for seven months) and the general administrative discretion to manage the time required for decision (and thus to limit or expand interim collections under tariffs which may be found unlawful) holds the view that shippers have the right to restitution in the event that it finds the interim collections unlawful. In the *Associated* case (*supra*) where the government (as shipper) seeks restitution under identical circumstances, the position of the ICC is reported thus:

> The Interstate Commerce Commission, although not a party to this action, is fully in accord with the position taken here, and in our main brief. The Commission advised the Department of Justice in connection with the appeal of this case that in its view the remedy of restitution survived the passage of the Motor Carrier Act, and that allowance of the remedy would further the purposes of the act. (Foot-

---

[7] While shippers could, theoretically, preserve their rights by filing an action at law seeking reparation under § 204a in the event that interim charges are subsequently condemned in a pending in-

note 5, page 3 of Justice Department Brief in case 72-1946 *U.S.* v. *Associated Transport, Inc.*)

If the ICC is wrong in this view, it should be apprised of the error in unequivocal terms, so that it can manage its administrative function in the certain knowledge of the consequences of delay in resolving these investigations and properly advise inquiring shippers of their rights.

The questions presented by this case are of vital and continuing importance to interstate shippers and carriers. The answers should not be left to guesswork or reasoned surmise. The court below acknowledges uncertainty in announcing one view and the federal agency which passes upon the lawfulness of the involved motor carrier charges holds a different view. The Eighth and Fifth Circuits have reached diametrically opposed conclusions with respect to the exclusiveness of the 1965 "reparations" remedy. The existing uncertainty can only be resolved through a definitive ruling by this Court.

---

vestigation, such protective suits would clog the dockets of both courts and the ICC and are for that and other good reasons, not to be encouraged. *Crown Coat Front Co.* v. *U.S.*, 386 U.S. 503, 515 (1967).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

RICHARD J. HARDY
425 Thirteenth Street, N.W.
Washington, D. C. 20004

RICHARD W. DORTCH
First National Bank Bldg.
Jackson, Mississippi 39205

MICHAEL P. REGAN
Mohasco Industries, Inc.
57 Lyon Street
Amsterdam, New York 12010

RICHARD H. LANGE
Mohasco Industries, Inc.
57 Lyon Street
Amsterdam, New York 12010

Counsel for Petitioners

Of Counsel:

HARDY & CHAPMAN

July 1, 1974